UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD WASHINGTON, DC

SPECIALTY HEALTHCARE AND REHABILITATION CENTER OF MOBILE))))
Employer,)
and) Case No. 15-RC-8773
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION))))
Petitioner))

EMPLOYER'S REPLY BRIEF

NOW COMES Specialty Healthcare and Rehabilitation Center, the Employer herein, and files its Reply Brief as follows:

INTRODUCTION

On December 18, 2008, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("Union") filed a petition seeking to represent the Employer's employees in the following bargaining unit:

Included: All CNAs employed at the Mobile, AL facility;

Excluded: All Office/Clerical employees, all Dietary employees, professional employees, guards and supervisors as defined by the Act.

Following a hearing, the Regional Director issued a Decision and Direction of Election finding that "[d]istinct training, certification, supervision, uniforms, pay rates, work assignments,

shifts, and work areas all demonstrate that the CNAs share a community of interest and form an appropriate bargaining unit." (D&D, 11). The Employer filed a timely Request for Review.

On February 19, 2009, the Board granted the Employer's Request for Review, and on August 27, 2010, the Board affirmed the grant of review. On December 22, 2010, the Board issued a Notice and Invitation to File Briefs in the matter. On March 8, 2011, the parties filed briefs responding to the questions posed by the Board. Numerous amicus briefs were also filed. The Employer now files this Reply Brief to the Union's Brief.

DISCUSSION

The arguments advanced by the Union in support of the Regional Director's Decision are largely addressed and refuted in the Employer's Opening Brief. However, the Union does make one "new" argument to which the Employer will now respond. Specifically, citing two decisions by the United States Court of Appeals for the District of Columbia Circuit, the Union argues that the appropriate analysis when an employer seeks to add employees to a unit proposed by a union is whether the employees sought to be added share an "overwhelming" community of interest with the employees sought to be represented by the union. This argument is without merit and should be rejected.

The Union confuses the standard applied in accretion cases or where there is a historical bargaining unit with the standard applied in representation cases where there is no preexisting unit. In accretion cases, where a party seeks to add an unrepresented group of employees to an existing unit of represented employees, the Board applies a "restrictive" policy so as not to deny the unrepresented employees their section 7 right to choose their own representative or to have

¹ The election was conducted, and the ballots were impounded.

none at all. Thus, in *Frontier Telephone of Rochester*, 344 NLRB 1270, the Board summarized its prior precedent regarding accretion as follows:

The fundamental purpose of the accretion doctrine is to "preserve industrial stability by allowing adjustments in bargaining units to conform to new industrial conditions without requiring an adversary election every time new jobs are created or other alterations in industrial routine are made." NLRB v. Stevens Ford, Inc., 773 F.2d 468, 473 (2d Cir. 1985). However, because accreted employees are absorbed into an existing bargaining unit without an election or other demonstrated showing of majority status, the accretion doctrine's goal of promoting industrial stability places it in tension with the right of employees to freely choose their bargaining representative. Accordingly, the Board follows a restrictive policy in applying the accretion doctrine. Safeway Stores, 256 NLRB 918 (1981); and Wackenhut Corp., 226 NLRB 1085. 1089 (1976). One aspect of this longstanding restrictive policy, which was recently restated in E. I. Du Pont, Inc., [341 NLRB 607 (2004),] has been to permit accretion "only when the employees sought to be added to an existing bargaining unit have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted."

344 NLRB at 1271.

Two factors are deemed "critical" to an accretion finding, These factors are employee interchange and common day-to-day supervision. *Id.* Further, it is well settled that "accretion is never appropriate as to a group that the parties to a bargaining relationship historically have failed to include in the unit." *Id.* at 1274.

Of a somewhat related nature is the Board's precedent regarding historical bargaining units. Such units will be accepted even when they would be deemed inappropriate if submitted to the Board for decision. *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111 (D.C. Cir.)—cited by the Union—is such a case. The issue in that case concerned a successor employer's refusal to bargain because it contended that the three historical units were inappropriate under Board precedent. As the court noted, the Board reversed the ALJ and found that "the ALJ had used the improper measuring stick of whether the bargaining units would be found 'appropriate' if the

employees were being organized for the first time and so had not given adequate weight to the Board's longstanding policy that a history of harmonious bargaining between a particular unit and an employer creates a presumption that the historical bargaining unit remains appropriate." *Id.* at 114. The court noted that the Board " 'is reluctant to disturb units established by collective bargaining so long as those units are not repugnant to Board policy or so constituted as to hamper employees in fully exercising rights guaranteed by the Act.' " *Id.* (quoting *NLRB v. Marin Operating, Inc.*, 822 F.2d 890, 893 (9th Cir.1987) (quoting *Buffalo Broadcasting Co.*, 242 N.L.R.B. 1105, 1106 n. 2 (1979)).

The court in *Trident Seafoods* rejected the employer's contention that the Board should have applied the traditional community-of-interest standard, noting that "the Board usually applies the community-of-interest and plant-wide unit tests only when delineating units of previously unrepresented employees, not, as here, when it is assessing historical units that have had long periods of successful collective bargaining." 101 F.3d at 118. "Although no single standard has been applied by the Board in every case, a review of the precedents suggests that a successor employer can meet this burden by showing that a historical unit is 'repugnant to Board policy." *Id.* Thus, the standard that the court applied in *Trident Seafoods* was acknowledged by the court to be different than the standard that would be applied in a situation where the proposed unit was previously unrepresented.

Similarly, in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008), there were two employers, Blue Man and the Luxor Hotel. Blue Man employed only the musical instrument technicians (MITS), who were unrepresented. Luxor employed all other stage employees, who were represented by the union. When Blue Man moved from the Luxor Hotel to another venue, it hired all of the stage employees previously employed by Luxor. The Union then filed a

representation petition seeking a separate unit of all stage employees, excluding the MITs. This of course was the same unit it had represented at the Luxor Hotel. In this context of a historically recognized unit, the Board rejected Blue Man's contention that the unit had to include the MITs, and the court agreed with the Board.

Blue Man and Trident Seafoods have no application to this case. Here, there is no historically represented bargaining unit. Instead, we are dealing with a petition seeking a unit of historically unrepresented employees. The Board's long-standing practice is to make such unit determinations on the basis of the community-of-interest test. While the unit requested by the Union need not be the "most appropriate" unit, it must not arbitrarily exclude employees who share a close community of interest with the included employees. It is not necessary that the ostensibly excluded employees share an "overwhelming" community of interest with the employees in the proposed unit. "In determining whether the employees in the unit sought possess a separate community of interest, the Board examines such factors as mutuality of interest in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration." Boeing Co., 337 NLRB 152, 153 (2001). Indeed, in Boeing, the Board found that although the unit requested by the union had a certain unique community of interest, "[t]hese distinctions, however, are offset by the highly integrated work force, the similarity in training and job functions between the [requested employees] and [a second group of] employees, and the comparable terms and conditions of employment among all three groups [of employees." Id. Thus, the Board held that the smallest appropriate unit consisted of all three groups of employees.

In any event, whatever the merits of adopting the Union's proposed "overwhelming" community of interest standard generally (and the Employer sees none), this standard most certainly should not be adopted in the context of the health care industry. As discussed at length in the Employer's opening brief, Congress was highly concerned with the potential for fragmented bargaining units in the health care industry. The Board itself recognized these concerns when it engaged in rulemaking with regard to acute care hospitals. Given the acknowledged fact that there is greater integration of employees and overlap of functions in nursing homes than in acute care hospitals, it is clear that application of an "overwhelming" community-of-interest standard to nursing homes would constitute an abuse of the Board's discretion.

The record here demonstrates that the education, training, and skills of a CNA are not remarkably different than the other jobs in the Employer's proposed unit. Their wages are substantially similar, and fall comfortably within the range of those performing other jobs in the Employer's proposed unit. Their supervision is generally the same, as most report ultimately to the DON. They enjoy identical benefits, and they share in the same terms and conditions of employment as other employees. Finally the evidence shows that the CNAs at the Mobile facility have frequent, if not daily, contact with other employees in the Employer's proposed unit, and that all of these employees work together in a well-established "collaborative effort" to provide resident care. Thus, the CNAs are not separate and distinct from the other non-professional employees in the Employer's facility, and would certainly not constitute an appropriate unit by themselves.

CONCLUSION

The Employer respectfully requests that the Board apply *Park Manor* to this case, as well as to future cases, and that it dismiss the petition.

Respectfully submitted this 22nd day of March, 2011.

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CERTIFICATE OF SERVICE

I certify I have filed one electronic copy of the Employer's Reply Brief with the Executive Secretary's Office via the NLRB e-filing system. In addition, I certify that I have served a copy via electronic delivery or facsimile, as well as a hard copy via UPS Overnight Delivery, to the following parties:

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This 22nd day of March, 2011.

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